I. Background

A. History

BLM administers livestock grazing on BLM lands within the continental United States under the regulations found at 43 C.F.R. 4100. Statutory authority for these regulations includes the following:

1. The Taylor Grazing Act (TGA) as amended (43 U.S.C. 315, 315a through 315r);
2. The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 et seq.) as amended by the Public Rangelands Improvement Act (PRIA) (43 U.S.C. 1901 et seq.);
3. Section 4 of the Oregon and California Railroad Lands Act (43 U.S.C. 1181d);
4. Executive orders that transfer land acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012) to the Secretary and authorize administration under TGA; and
5. Public land orders, executive orders and agreements authorizing the Secretary to administer livestock grazing on specified lands under TGA or on other lands as specified.

Section 202 of FLPMA requires the development and maintenance of land use plans for public lands. BLM land use plans are designed to provide guidance for future management actions and the development of subsequent, more detailed and limited-scope plans for resources and uses. Land use plans are developed under the multiple-use and sustained-yield mandate of FLPMA. Land use plans identify lands that are available for livestock grazing and the parameters under which grazing is to occur. BLM issues

grazing permits or leases for available grazing lands. Grazing permits and leases specify the portion of the landscape BLM authorizes to the permittee or lessee for grazing (i.e., one or more allotments) and establish the terms and conditions of grazing use. Terms and conditions include, at a minimum, the number and class of livestock, when and where they are allowed to graze, and for how long. Grazing use must conform to any applicable allotment management plans, the terms and conditions of the permit or lease, land use plan decisions, the grazing regulations, and other applicable laws.

Since the first set of grazing regulations was issued after passage of the TGA in 1934, the regulations have been periodically amended and updated. The last major revision effort was called “Rangeland Reform ’94." In February 1995, BLM published comprehensive changes to the grazing regulations and put them into effect in August 1995. Major changes made to the regulations in 1995 included the following:

- Revised the term “grazing preference” to mean a priority position against other applicants for receiving a grazing permit, rather than a specified amount of public land forage apportioned and attached to a base property owned or controlled by a permittee or lessee, and added the term "permitted use" to describe forage use amounts allocated by or under the guidance of an applicable land use plan, and authorized by grazing permits or leases;
- Provided that BLM could issue a “conservation use” permit to authorize permittees not to graze their permitted allotments;
- Limited authorized temporary nonuse to 3 consecutive years;

• Required grazing fee surcharges for permittees who do not own the livestock that graze under their permits;

• Provided that the United States holds 100 percent of the vested title to permanent range improvements, such as fences, wells, and pipelines, constructed under cooperative agreements dated after August 21, 1995, rather than proportionately sharing title with the cooperators;

• Required livestock operators and BLM to use cooperative agreements to authorize new permanent water developments, instead of allowing some water developments to be authorized under range improvement permits;

• Provided that after August 21, 1995, any water right acquired on public land to be used for livestock watering on public land must be acquired, perfected, maintained, and administered under substantive and procedural laws of the state where the land is located, and that such water rights are to be acquired in the name of the United States, to the extent allowed by the law of the state;

• Established fundamentals of rangeland health; and

• Created a process for developing and applying state or regional standards for land health and guidelines for livestock grazing as a yardstick for grazing management performance.

Soon after the grazing regulations took effect on August 21, 1995, a lawsuit was filed challenging the validity of several of the new regulations. All challenged provisions except "conservation use" (see the second bullet, above) were upheld. Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd, 529 U.S. 728 (2000).

On March 3, 2002, BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent (NOI) to prepare an environmental impact statement (EIS) in the Federal Register (68 FR 9964-9966 and 10030-10032, respectively). These notices requested public comment and input to assist BLM with the scoping process for the proposed rule and the EIS. The comment period on the ANPR and the NOI ended on May 2, 2003.

During the scoping process, BLM held four public meetings to elicit comments and suggestions for the proposed rule and development of the draft environmental impact statement (DEIS). The meetings were held during March 2003 in Albuquerque, New Mexico; Reno, Nevada; Billings, Montana; and Washington, D.C. BLM received approximately 8,300 comments on the ANPR and the NOI. The majority of these were varying types of form letters.

We considered many of the issues that the public raised during the scoping period and discussed several of them as alternatives in the DEIS. We did not address, however, some of the issues that comments raised, because they were either beyond the scope of the document, did not meet the basic goals of these proposed changes to the regulations, or BLM decided we could better address the issues through internal policy changes. We listed and discussed these issues in the proposed rule (68 FR 68455), and in section 1.3.2 of the DEIS, and there is no need to repeat them here.

We published the proposed rule on December 8, 2003 (68 FR 68452), inviting public comments until February 6, 2004. On January 16, 2004, we published a notice to extend the comment period to March 2, 2004 (69 FR 2559). BLM held six public meetings in late January and early February, 2004, to provide the public an opportunity to comment on the proposed rule. Meetings were held in Salt Lake City, Utah; Phoenix, Arizona; Boise, Idaho; Billings, Montana; Cheyenne, Wyoming; and Washington, D.C. Approximately 250 individuals attended the public meetings and 95 provided oral comments. These were transcribed and can be viewed on the BLM web site at www.blm.gov/grazing. We received about 18,000 comment letters and electronic communications. Most of the comments were form letters or emails. An exact count of the comments is not available because of the large amount of duplication among the comments due to individuals or entities submitting identical comments multiple times or via different media. We did not attempt to keep track of all the duplications, although we observed many. You may view comment letters, including scanned images of faxes and handwritten letters, on BLM's regulatory comment system accessible at www.blm.gov/nhp/news/regulatory/index.html.

B. Why We Are Amending the Regulations

The grazing regulations are being amended based largely on lessons learned in implementing the 1995 regulations. Other changes are designed to improve clarity, ensure internal consistency, and address the 10th Circuit holding regarding "conservation use" permits.

Many changes have been made in livestock grazing management and practices to improve the health of the public rangelands since the passage of the TGA in 1934 and FLPMA in 1976. The final rule recognizes the many benefits of livestock grazing on public lands, including its social and economic contributions to rural communities and its preservation of open space in the rapidly growing West, as well as the importance of maintaining healthy rangelands and wildlife habitat.

When we developed this final rule, we considered whether the changes facilitated improving working relations with grazing permittees and lessees, protecting the health of rangelands, or increasing administrative efficiency and effectiveness. The changes in the final rule enhance BLM's ability to accomplish each of these objectives.

The major changes in the final rule are listed below by objective.

Improving Working Relations with Grazing Permittees and Lessees

- Require BLM to follow a consistent approach in analyzing and documenting the relevant social, economic, and cultural effects of proposed changes in grazing preference and incorporate such analyses into appropriate National Environmental Policy Act (NEPA) documents.
- Require phase-in of changes in grazing use of more than 10 percent over a 5-year period, consistent with relevant law.

- Provide for joint ownership of range improvements—changes would allow BLM and a grazing permittee, or other cooperator, to share title to certain structural range improvements, such as fences, wells, or pipelines, if they are constructed under a Cooperative Range Improvement Agreement.
- Require BLM to cooperate with Tribal, state, county, and local government-established grazing boards in reviewing range improvements and allotment management plans on public lands.

Protecting the Health of Rangelands

- Remove the 3-consecutive-year limit on temporary nonuse of a grazing permit but continue to require BLM to review nonuse annually to make sure it is still necessary, whether for resource conservation, enhancement, or protection, or for personal or business purposes.
- Provide that a standards assessment will be used by the authorized officer to gauge whether rangeland is failing to achieve standards or that management practices do not conform to the guidelines, and where assessments indicate failure to achieve standards or to conform with guidelines, require BLM to use existing or new monitoring data to identify the factors that significantly contribute to failing to achieve standards or conform with guidelines.
- Provide additional time after a determination that grazing practices or levels of use are significant factors in failing to achieve standards and conform to guidelines for BLM to formulate, propose, and analyze actions; to comply with all

applicable laws; and to complete all consultation, cooperation, and coordination requirements before reaching a final decision on appropriate actions.

Increasing Administrative Efficiency and Effectiveness

- Eliminate the "conservation use" permit regulatory provisions to comply with the Tenth Circuit Court of Appeals decision in Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999), aff'd on other grounds, 529 U.S. 728 (2000).
- Expand the definition of "grazing preference" to include an amount of forage on public lands attached to a rancher's private base property, which can be land or water. This expanded definition, similar to one that existed from 1978 to 1995, makes clear that grazing preference has a quantitative meaning (forage amounts, measured in Animal Unit Months (AUMs)) as well as a qualitative one (priority of position "in line" for grazing privileges).
- Modify the definition of "interested public" to ensure that only those individuals and organizations who actually participate in the process are maintained on the list of interested publics. (The regulations with respect to the interested public are also revised to improve efficiency in BLM's management of public lands grazing by reducing the occasions in which the Bureau is required to involve the interested public. Under this provision, BLM could involve the public in such matters as day-to-day grazing administration, but would no longer be required to do so. BLM would continue to require consultation, cooperation, and coordination with the interested public in grazing planning activities such as

allotment management planning or range improvement project or program planning.)

- Provide flexibility to the Federal government in decisions relating to livestock water rights by removing the requirement that, if BLM acquires water rights for livestock watering on public land under state law, BLM must acquire, perfect, maintain, and administer those water rights in the name of the United States where allowed by State law.
- Clarify that an applicant for a new permit or lease will be deemed to have a record of satisfactory performance when the applicant has not had any Federal or state grazing permit or lease canceled, in whole or in part, for violation of the permit or lease within the 36 calendar months immediately preceding the date of application, and a court of competent jurisdiction has not barred the applicant or an affiliate from holding a Federal grazing permit or lease.
- Clarify what is meant by “temporary changes in grazing use within the terms and conditions of permits and lease." Under the 1995 regulations, BLM can approve temporary changes in grazing use within the terms and conditions of a permit or lease. The final rule clarifies that "temporary changes in grazing use within the terms and conditions" means temporary changes to livestock number, period of use, or both, that would result in nonuse or in grazing use where forage removal does not exceed the amount of active use specified in the permit or lease, and such grazing use occurs not earlier than 14 days before the begin date specified on the permit or lease and not later than 14 days after the end date

specified on the permit or lease, unless otherwise specified in the appropriate allotment management plan.

- Increase certain service charges to reflect more accurately the cost of grazing administration.
- Clarify that if a permittee or lessee is convicted of violating a Federal or state law or regulation, and if the violation occurs while he is engaged in grazing-related activities, BLM may take action against his grazing permit or lease only if the violation occurred on the BLM-managed allotment where the permittee or lessee is authorized to graze.
- Provide the authority for BLM to issue an immediately effective decision on non-renewable grazing permits or leases or on applications for grazing use on designated ephemeral or annual rangelands. Under the final rule, if a stay on an appeal of such a decision is granted, the decision would be inoperative and, if appropriate considering the specific stay, the livestock may have to be removed from the allotment.
- Clarify how BLM will authorize grazing when the Office of Hearings and Appeals (OHA) stays all or part of a BLM grazing decision affecting a permit or lease. Such decisions may:
    - cancel, suspend or change terms and conditions of a permit or lease during its current term,
    - renew a permit or lease, or
    - grant or deny a permit or lease to a preference transferee.

Under the final rule, if OHA stays all or part of such a decision, then BLM will, with respect to any stayed portions of the decision, authorize grazing use on the allotment(s) or portions of the allotment(s) in question pursuant to terms or conditions that are the same as the permit or lease that immediately preceded BLM's decision, subject to any other provisions of the stay order.

- Clarify that a biological assessment or biological evaluation, prepared in compliance with the Endangered Species Act (ESA), is not a decision and therefore is not subject to protest or appeal.
- Provide that the primary function of the fundamentals of rangeland health is to describe land condition goals and to guide development of the Standards and Guidelines that must be implemented to ensure that the conditions described by the fundamentals of rangeland health exist.

The reasons for the changes in the final rule are described in the Record of Decision in Part III of this preamble.

C. Rules of construction: words and phrases**.**

For simplicity and to make the rule easier to read and understand we use words that signify the singular to include and apply to the plural and vice versa as provided in 43 CFR 1810.1. Words that signify the masculine gender also include the feminine. Words used in the present tense also apply to the future. The terms "BLM" and "authorized officer" are used interchangeably and include any person authorized by law or by lawful delegation of authority to perform the duties described in this final rule.